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In the Supreme Court of the United States

OCTOBER TERM, 1957

WILLIAM GLANZMAN, D/B/A GLANZMAN STUDIOS, AND WILLIAM GLANZMAN, D/B/A BOWERY ENTERPRISES, PETITIONER

v.

ROBERT H. SCHAFFER, AS POSTMASTER, NEW YORK, NEW YORK

ON MOTION FOR LEAVE TO APPEAL ON TYPEWRITTEN PAPERS, ETC., AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York denying petitioner's motion for a preliminary injunction in *Glanzman Studios* (Printed R. 29)[1] is reported at 143 F.

[1] The record in the *Glanzman Studios* case includes the printed record in the court below (cited herein as Printed R. ——), the original record transmitted from the District Court to the Court of Appeals, and the administrative record in the Post Office Department which was filed as an exhibit in the District Court (cited as *Glanzman* R. Original Exhibits). The record in the *Bowery Enterprises* case consists of the original record transmitted from the District Court to the Court of Appeals (cited herein as *Bowery* R. ——).

Supp. 243. The opinion of the District Court granting respondent's motion for summary judgment in *Glanzman Studios* (Printed R. 39) is unreported. The opinion of the District Court granting respondent's motion for summary judgment in *Bowery Enterprises* (*Bowery* R. 49) is unreported. The opinion of the Court of Appeals for the Second Circuit affirming the judgments of the District Court in the *Glanzman Studios* and *Bowery Enterprises* cases is reported at 252 F. 2d 333 (Printed R. 42–45).

JURISDICTION

The judgments of the Court of Appeals were entered on February 7, 1958 (Printed R. 46–47). The petition for certiorari covering both the *Glanzman Studios* and *Bowery Enterprises* cases was filed on May 8, 1958 (Sup. Ct. Rule 23 (5)). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). It appears however, that the actions have abated. This point is discussed at pp. 10–14, *infra*.

QUESTIONS PRESENTED

1. Whether the cases have abated in view of the fact that the named defendant retired from office on May 31, 1957, and no substitution of his successor was made within six months.

2. Whether there was sufficient evidence to support the determination of the Post Office Department that petitioner was using the mails in violation of 39 U. S. C. 259a.

3. Whether the Postmaster General validly delegated his authority to issue postal stop orders under

39 U. S. C. 259a to the Solicitor of the Post Office Department.

4. Whether the terms "obscene, lewd [and] lascivious" as used in 39 U. S. C. 259a are unconstitutionally vague.

5. Whether petitioner was entitled to a trial *de novo* by a jury in his suit in equity to review the Post Office Department's finding that, under the name *Bowery Enterprises,* he was depositing information in the mails as to where obscene matter might be obtained.

RULES AND STATUTE INVOLVED

Rule 25 (d) of the Federal Rules of Civil Procedure provides:

> (d) *Public Offices; Death or Separation from Office.* When an officer of the United States or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly

assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

Rule 48 (3) of the Revised Rules of the Supreme Court provides:

> 3. When an officer of the United States, or of the District of Columbia, a Territory, Commonwealth, Possession, State, county, city or other governmental agency, is a party to a proceeding here, and it is shown that he has died, resigned, or otherwise ceased to hold office, the action may be continued and maintained by or against his successor, if within six months after the successor takes office it is satisfactorily shown to the court, on motion, that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this paragraph may be made when it is shown in the motion that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Service of and response to a motion to substitute under this paragraph shall be made as provided by Rules 33 and 35, respectively. Unless otherwise provided by law, no notice of appeal and no petition for writ of certiorari may be filed on behalf of an officer who has ceased to hold office.

39 U S C. 259a (Act of August 16, 1950, 64 Stat. 451) provides as follows:

> Exclusion from mails of obscene, lewd, etc., articles matters, devices, things, or substances.
>
> Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, com-

pany, partnership or association is obtaining, or attempting to obtain, remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, and the Postmaster General may provide by regulation for the return to the remitters of

the sums named in such money orders or postal notes.

STATEMENT

These two cases were brought by an individual doing business under the names *Glanzman Studios* and *Bowery Enterprises,* to restrain respondent, who was then Postmaster at New York City, New York, from enforcing orders issued by the Post Office Department forbidding the payment of any money orders addressed to petitioner's operations under these names, and directing that mail so addressed should be returned to the sender marked "Unlawful: Mail to this address returned by order of the Postmaster General." The orders were issued after proceedings in the Post Office Department upon complaints by the Department's Assistant Solicitor in charge of the Fraud and Mailability Division, charging that petitioner's enterprises were violating 39 U. S. C. 259a in two respects: by obtaining remittances of money for obscene matter; and by giving information as to where, how and from whom such matter may be obtained.

1. *Glanzman Studios.* A Post Office complaint was filed against Glanzman Studios on October 21, 1955. A hearing was held at which the Assistant Solicitor offered in evidence various advertisements, and a collection of photographs, movies, and slides which petitioner had caused to be deposited in the mails. These materials depicted posed nude or nearly nude females. On February 9, 1956, the Post Office Department's hearing examiner issued an initial decision concluding that petitioner was conducting an enterprise in violation of 39 U. S. C. 259a. This decision was affirmed

by the Solicitor of the Post Office Department on June 21, 1956, and an order was issued to respondent by the Solicitor forbidding him to pay money orders addressed to petitioner and directing him to return petitioner's mail to the sender (*Glanzman* R., Original Exhibits).

On June 25, 1956, petitioner filed a complaint in the District Court seeking to restrain respondent from enforcing the order, and praying a declaratory judgment that it was invalid under the First and Fifth Amendments of the Constitution (Printed R. 4). Petitioner moved for a preliminary injunction on the grounds that the administrative proceedings were invalid by reason of illegal delegation by the Postmaster of his powers under 39 U. S. C. 259a; lack of proper separation of judicial and prosecutive functions in the administrative forum; and absence of an adequate standard in 39 U. S. C. 259a for determining when matter is obscene. On July 11, 1956, the District Court issued an opinion denying a preliminary injunction. This opinion analyzed in detail petitioner's contentions that the order was illegal. The court held that there had been no invalid delegation by the Postmaster; that there had been no violation of the principles of separation of prosecutive and judicial functions; that the administrative findings and conclusions had substantial support; and that 39 U. S. C. 259a was not unconstitutionally vague (Printed R. 29–38). Thereafter, petitioner moved for the convening of a three-judge court to determine the constitutionality of 39 U. S. C. 259a. Respondent filed a motion for summary judgment which was granted by the Dis-

trict Court on the grounds indicated in its opinion denying petitioner's motion for preliminary injunction (Printed R. 39). The application for a three-judge court was denied on the ground that no substantial constitutional question was presented.

On October 10, 1956, petitioner appealed from that decision to the Court of Appeals for the Second Circuit (Printed R. 40).

2. *Bowery Enterprises.* Immediately after the Post Office Department had issued a stop order against Glanzman Studios, petitioner began doing business as Bowery Enterprises with the same materials used in the interdicted operation (*Bowery* R. 29–32). On August 23, 1956, the Assistant Solicitor of the Post Office Department filed an administrative complaint against Bowery Enterprises, charging it with violation of 39 U. S. C. 259a (*Bowery* R. 151). At the administrative hearing circulars similar to those involved in the *Glanzman Studios* case were put in evidence (*Bowery* R. 104), but none of the films and photos advertised was introduced (*Bowery* R. 114). The Hearing Examiner found, on the basis of the circulars, that Bowery Enterprises was depositing information in the mails as to where obscene matter might be obtained, and he recommended that a stop order issue on this ground (*Bowery* R. 119). Because the merchandise itself had not been introduced in evidence; however, he held that there was insufficient evidence to support the separate charge that Bowery Enterprises was obtaining remittances of money for obscene matter (*Bowery* R. 119). Upon

appeal, the General Counsel (formerly Solicitor) of the Post Office Department adopted the Hearing Examiner's recommendation (*Bowery* R. 55–57), and respondent was ordered to return all mail addressed to Bowery Enterprises, except mail which could be identified on its face as being unconnected with the illegal enterprise (*Bowery* R. 58).[2]

On May 9, 1957, petitioner filed suit in the District Court to restrain enforcement of the order stopping mail addressed to Bowery Enterprises and demanded a jury trial in connection therewith (*Bowery* R. 1). On June 11, 1957, the District Court granted respondent's motion for summary judgment, noting that the issues were much the same as those involved in the *Glanzman Studios* case (*Bowery* R. 49).

On July 26, 1957, petitioner noted an appeal from this decision to the Court of Appeals for the Second Circuit (*Bowery* R. 52).

3. *Respondent's resignation.* On May 31, 1957, Robert H. Schaffer resigned as postmaster at New York, New York, and left Government service. Effective with the close of business on that day, Mr. Howard Coonen, Regional Operations Director, was designated to take charge of the New York City post

[2] Petitioner raises no question as to the scope of the stop orders—the main question raised by the petitioner in *Klaw* v. *Schaffer*, No. 921, this Term. The order issued in *Glanzman Studios* was similar to that issued in *Klaw*. The order issued in *Bowery Enterprises* was of an intermediate form used prior to the new form which is now in use. See Brief for the Respondent in Opposition, *Klaw* v. *Schaffer*, No. 921, this Term, pp. 13–15.

office.[3] As such, Mr. Coonen was successor to Mr. Schaffer as the officer responsible for the enforcement of the orders against which petitioner is complaining. No application to continue the action against the successor was made, nor did either party call the problem of abatement or substitution to the attention of the Court of Appeals.

4. *Decision of the court below.* Both cases were argued in the Court of Appeals on November 7, 1957. On February 7, 1958, that court issued an opinion affirming the judgments of the District Court in both cases. The court held that "With one exception all the constitutional issues sought to be raised by these appeals were decided against appellant in *Roth* v. *United States,* 354 U. S. 476". Petitioner had also contended that application of the standard in *Roth* required a trial by jury of the issue of obscenity. Noting that a jury had been demanded only in the *Bowery Enterprises* case, the Court of Appeals held that there was no basis for the contention in either action that a jury was mandatory. Finally, it held that the District Court properly refused to convene a three-judge court to consider the constitutional questions urged by petitioner (Printed R. 42–45).

ARGUMENT

1. These actions have abated. We repeat here the argument with respect to abatement made in our Brief

[3] See Brief for the Respondent in Opposition, *Klaw* v. *Schaffer*, No. 921, this Term, Appendix A, page 20. Mr. Coonen continued in that assignment for just over one year. On June 3, 1958, Mr. Robert K. Christenberry was sworn in as Acting Postmaster of New York.

in Opposition filed this week in another case against the same postmaster, *Klaw* v. *Schaffer,* No. 921, this Term. Respondent Robert H. Schaffer, the only party defendant herein, resigned as Postmaster of the New York City Post Office on May 31, 1957. Effective at the close of business the same day, Mr. Howard Coonen, Regional Operations Director, was designated to take charge of the United States Post Office at New York, New York. For more than one year Mr. Coonen exercised all authority previously exercised by respondent in connection with the enforcement of the postal stop orders outstanding against petitioner, and as such was a necessary party. Since respondent has not held any government office for a year, and is without any authority whatever over the operations of the New York Post Office, this action against him necessarily abated because his successor was not substituted as party defendant within six months after taking office, Supreme Court Rule 48 (3); Federal Rules of Civil Procedure 25 (d). See *Snyder* v. *Buck,* 340 U. S. 15; *United States, ex rel. Bernardin* v. *Butterworth,* 169 U. S. 600; *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, 31; *United States* v. *Boutwell,* 17 Wall. 604, 608; *The Secretary* v. *McGarrahan,* 9 Wall. 298, 313.

Under this Court's Rule 48 (3) and Rule 25 (d) of the Federal Rules of Civil Procedure, this action could have been continued after respondent's separation from office only if his successor, Mr. Coonen, had been substituted before December 1, 1957. No such substitution was made. The absence of a necessary party and the time barrier to substitution "go to juris-

diction"; the rule of abatement for failure to substitute is "not to be altered by an agreement of the parties or by some theory of estoppel". *Snyder* v. *Buck*, 340 U. S. 15, 19, 22. Since respondent no longer holds office, and it is too late to substitute his successor, the judgment below cannot be reviewed on the merits by this Court.[4] In these circumstances we believe certiorari should be denied. Under its prior decisions the Court is not free to pass upon any of the questions presented in the petition for certiorari.

Petitioner Klaw, in a reply brief filed June 4, 1958, in No. 921, this Term, *Klaw* v. *Schaffer*,[4a] argues that Mr. Coonen was not a successor to Mr. Schaffer. That petitioner suggests that the only person who can be a successor to a postmaster is another postmaster, that "A Postmaster must be appointed by the President by and with the advice and consent of the Senate" (Reply Br. p. 3), and that petitioners have until six months after such a successor has taken office in which to make a substitution.

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[4] Substitution could not be effected at this late date even if the Government were to acquiesce in petitioner's motion. *Matheus* v. *United States ex rel. Cunningham*, 282 U. S. 802; *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590, 591. See *Snyder* v. *Buck*, 340 U. S. 15, 19.

The rule cuts both ways. The Government can not file a petition for certiorari or a notice of appeal in this Court on behalf of an officer who has ceased to hold office. Supreme Court Rule 48 (3). (On May 13, 1958, the Court of Appeals for the Second Circuit decided two cases against the same postmaster—again, apparently, cases in which no substitution had been made. *Columbia Research Corp. et al.* v. *Schaffer*, No. 24831; *Vibra Brush Corp.* v. *Schaffer*, No. 24683.)

[4a] A copy of this brief is being sent to petitioner Klaw; a copy of our response in that case was sent to petitioner here.

We believe that Rule 25 (d) of the Federal Rules of Civil Procedure and Rule 48 (3) of the Revised Rules of the Supreme Court cannot be construed as continuing actions against former officers of the government indefinitely unless the alleged injury is being threatened or caused by an officer with the same title and appointed in the same manner. The purpose of requiring substitution is to make certain that the new officer who is carrying on the functions of the defendant officer "adopts or continues or threatens to adopt or continue the action of his predecessor". Rule 48 (3), Revised Rules of the Supreme Court. The rules use "successor" in a functional sense. When an officer resigns, his functions may be divided up among other officers, or delegated to persons with different titles. There may never be a successor with the same title as the officer against whom the action was brought. In permitting substitution of a successor the rules cannot be read as permitting substitution only where the alleged injury is being threatened by an officer with the same title as that against whom the action was begun. To construe "successor" in the technical sense suggested by petitioner Klaw would result in the abatement of many cases where otherwise the rules would permit substitution of a functional successor.[5] Also, petitioner Klaw appears to recognize that his suit should be against the functional successor, Mr. Coonen, since he has moved this Court to substitute him in the pending case, and agrees

[5] A narrow construction of "successor" would presumably bar review by this Court of cases in which one officer "has ceased to hold office" but no one could be substituted since no "successor" had been appointed and confirmed. See last sentence of Rule 48 (3) of the Rules of this Court.

that an injunction "would not be futile against the Regional Director who is enforcing the order" (Reply Br. p. 4).

We see no reason for the Court to grant certiorari in order to consider the consequences of abatement. However, the Court may wish, consistent with its practice in prior cases, to vacate the judgments below and remand the cases to the District Court with instructions to dismiss them as abated. *Matheus* v. *United States ex rel. Cunningham,* 282 U. S. 802; *United States ex rel. Claussen* v. *Curran,* 276 U. S. 590, 591.

2. There was ample evidence in both cases that petitioner was using the mails in violation of 39 U. S. C. 259a. The statute defines two separate and distinct offenses: first, obtaining money through the mails for obscene matter; and second, depositing information in the mails as to where such matter may be obtained. Upon satisfactory evidence that any person is engaging in either of these activities, the Postmaster General may instruct postmasters to return to the sender all mail addressed to such persons, and forbid the payment of money orders addressed to them. In the *Glanzman Studios* case, the Post Office Department found that petitioner was committing both offenses; in the *Bowery Enterprises* case, it found that petitioner was committing only the "depositing information" offense. Petitioner is urging this Court to review his contention that his merchandise is not obscene within the test restated in *Roth* v. *United States,* 354 U. S. 476, but he does not here challenge the fact that, in both the *Glanzman Studios* and *Bowery Enterprises* operations, he was also violating the law by depositing

circulars in the mails inviting his correspondents to purchase obscene materials. To support a stop order based on the latter violation, the advertisements themselves need not be obscene. It is enough that they are an invitation to buy obscene materials. Cf. *United States* v. *Hornick*, 229 F. 2d 120, 122 (C. A. 3). In both the *Studio* and *Bowery* cases, the Post Office Department found that petitioner's circulars were plain-speaking invitations to purchase materials deliberately designed to appeal to prurient interest. Both courts below, after examining the evidence, sustained this finding, and petitioner does not challenge it here. This unchallenged finding is an adequate ground for the stop order, quite apart from any question as to whether the merchandise advertised to be obscene is in fact obscene within the *Roth* test. For this reason we submit that petitioner's contention that his merchandise is not obscene should not be reviewed by this Court. In addition, we submit that examination of petitioner's *Studio* merchandise in the context of the advertisements will show that it is plainly designed to appeal to prurient interest within the meaning of the test set forth in *Roth*.

3. Petitioner's contention that the Postmaster General invalidly delegated to the Solicitor of the Post Office Department his authority to issue orders under 39 U. S. C. 259a is clearly without merit. It is also of no prospective importance. The Postmaster General has been authorized by Congress "to delegate to any officer, employee, or agency of the Post Office Department designated by him such of his functions as he deems appropriate". Section 1 (b) of Reorganiza-

tion Plan No. 3 of 1949, 63 Stat. 1066. Referring specifically to this statutory provision, the Postmaster General, by General Order No. 55507, dated January 13, 1954 (Printed R. 34), authorized the Deputy Postmaster General to execute "all powers, functions and duties conferred by law upon the Postmaster General" and further authorized him to further delegate "such of the powers, functions and duties delegated to him by this order as he deems appropriate". The Deputy Postmaster General delegated to the Solicitor the Postmaster General's powers and duties under 39 U. S. C. 259a by Postmaster's Order No. 55628, dated May 17, 1954 (Pet. App. (2), p. 7). Acts of the Postmaster General's subordinates "are the acts of the Postmaster General when confined within the scope of the duties assigned to them by their chief." *United States* v. *Warfield,* 170 Fed. 43, 45 (C. A. 4); see *M'Collum* v. *United States,* 17 Ct. Cls. 92, 101–102. There can thus be no question here of invalid delegation. Cf. *Hargett* v. *Summerfield,* 243 F. 2d 29 (C. A. D. C.), certiorari denied, 353 U. S. 970; *Moroney* v. *Abrams,* 244 F. 2d 21 (C. A. D. C.), certiorari denied *sub nom. Moroney* v. *McKibben,* 355 U. S. 840.

Furthermore, the powers of the Postmaster General to issue stop orders under 39 U. S. C. 259a are no longer delegated to the General Counsel (formerly Solicitor). The General Counsel continues to present evidence and prosecute complaints against violators of the statute, but final decisions are now made for the Postmaster General by the Judicial Officer, a post recently established. 23 F. R. 2817. Thus petition-

er's claim of invalid delegation of authority to the Solicitor will have no bearing on future cases.*

4. Petitioner's contention that the terms "obscene, lewd and lascivious" are unconstitutionally vague as used in 39 U. S. C. 259a was definitively answered in *Roth* v. *United States*, 354 U. S. 476, 491–92.

5. This record does not present an occasion for review of petitioner's contentions that he was entitled to a jury trial of the factual questions presented in his suits in equity to review the Post Office Department's orders against him. In both cases the District Court held that there were no material issues of fact to be tried, and granted summary judgment for the respondent. But even if there had been issues of fact, no basis for a jury trial existed. In the *Studios* case, petitioner did not demand a jury trial (Printed R. 43, fn. 2). In the *Bowery* case, petitioner did demand a jury trial, apparently on the ground that he was entitled to a trial *de novo* by a jury in an equity suit to review an administrative order, if the issue involved was obscenity. As pointed out above, however, (*supra*, p. 14) the order against petitioner in the *Bowery* case was not based upon a finding that his merchandise was obscene, but on the ground that his circulars advertised obscenity. To support the latter finding it is enough that petitioner's advertisements said, as they in effect did, "Men! Buy your obscene materials here!"

A jury has never been required to review a Post Office Department finding as to the meaning of adver-

* Petitioner does not in this Court raise any question as to the proper separation of the judicial and prosecutive functions in the Post Office.

tisements deposited in the mails. Cf. *Donaldson* v. *Read Magazine,* 333 U. S. 178, 189–191. This Court has indicated that a jury trial is not required for a determination as to obscenity. *Kingsley Books* v. *Brown,* 354 U. S. 436. Since the issue of obscenity was not involved in the *Bowery* case, we submit that even the views expressed by Mr. Justice Brennan in dissent in *Kingsley Books* v. *Brown,* 354 U. S. 436, 447–448, are not applicable to this case and petitioner's reliance thereon is misplaced.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be denied.

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